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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~18041~~ 70-260

JACK L. KING,

Petitioner.

v.

UNITED STATES OF AMERICA

Repondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 9, 1971

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI
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The Petitioner, Jack L. King, respectfully prays that a writ of certiorari to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on May 10th, 1971.

## OPINION BELOW

The opinion of the Court of Appeals, as

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yet unreported, appears at Appendix A, infra, pp._ . . There was no formal opinion of the District Court. Excerpts of the transcript in that Court, including the verdict, judgment, and sentence, are reproduced in Appendix B to this petition.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 10th, 1971. See Appendix A,. pp. 15,16 ; infra. This petition for certiorari was filed within thirty days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

## QUESTIONS PRESENTED

Petitioner, a practicing attorney, and his secretary, were indicted and tried jointly in the United States District Court for the Southern District of Florida on 14 Counts of mail fraud, under the provisions of 18 U.S.C. Section 1341 and Section 2. On the trial petitioner was found guilty on 12 of the 14 counts. The secretary was discharged after the jury was unable to reach a verdict as to her.

The charges were, substantially, that petitioner and his secretary devised a scheto defraud a class of persons, to wit: Cuban refugees in the United States, and used

or caused to be used the United States Mail in furtherance of the alleged fraudulent scheme. The government brought to the trial a number of witnesses from the Cuban refugee class, to prove the alleged fraud. Only two of the many Cuban witnesses testified of any direct dealings with the petitioner. The first of these two made no complaints of any misrepresentation made to him by petitioner. The other one gave testimony that was clearly damaging to the petitioner and testified that he felt cheated.

When it came time for the defendant's case to be presented, petitioner attempted to call witnesses of the Cuban refugee class who had come to him for the same services to be performed as that done for the government's witnesses. Upon objection by the government, the trial court required a proffer of the testimony to be taken from these witnesses and after proffering one of the witnesses the court sustained the government's objection, and none of the witnesses of this class were heard by the jury. The questions arising therefrom are these:

'.-Whether the judgment and decision of the Court of Appeals in affirming the

judgment of the District Court, being in conflict with the decisions in the Seventh Circuit in Worthington v. United States, (1933) 64 F.2d 936, an United States v. Shavin(1961) 287 F.2d 647, 90ALR2d. 888, as these cases apply to the exclusion of defense witnesses in mail fraud cases, deprived the petitioner of a fair trial in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

2.-Whether the judgment and decision of the Court of Appeals, in affirming the conviction of petitioner, has mishapprehended the principles enumciated by the Supreme Court in Ingram v. United States, 360 US 672, in Kotteakos v. United States (1946), 328 U.S. 758, 756; 66 S. Ct. 1239, 1248; 90 L.Ed 1557, and followed by Phillips v. United States, 356 F. 2d. 297 and Reisman v. United States, 409 F.2d. 789, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

"No person shall. . . be compelled in

any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ."

## STATEMENT OF FACTS

The facts relevant to the questions presented by this petitioner are as follows:

1.- The district judge, in ruling favorably on the government's objection to the introduction of petitioner's witnesses from the Cuban refugee class, who had gone to petitioner's law office to seek assistance in getting their relatives out of Cuba on the so called "Freedom Flights", stated in part as follows:

> "I will permit you to put on any witness who is competent and would testify of their own knowledge that they went to Mr. King and that they retain Mr. King, and Mr. King did actually expedite the arrival of that relative from Cuba to the United States, but it is going to have to be of their own personal knowledge. And, frankly, I don't see how you can do it. But that is my ruling. I am going to sustain the objection to all of the evidence of a similar nature." (TR. 330)

Petitioner's purpose in attempting to put on these witnesses as expressed by his counsel on the trial was to show petitioner's lack of bad faith and of an intention to defraud.

The Assistant United States Attorney, in stating his objection to the presentation of these witnesses, was particularly vicious, when he stated:

> "The reason that that is incompetent testimony is because we have put on people who were defrauded. They are trying to put on people who came here and who claim they weren't defrauded. I could testify myself about that, that I was never defrauded by Mr. King. He can get a million witnesses that were never defrauded, but it all boils down to the fraud itself and whether or not he could expedite their return. And if he can show by competent evidence that this occurred, fine. But not by these people who sent cards and then they feel because this happened, it expedited their return." (TR. 332).

And again, the United States Attorney states:

> "To which we would object. What they are saying is thay want to put people on who came in and apparently were not made the same kind of proposals that our witnesses were made, and they were just made some sort of off-hand remarks like 'we can't guarantee anything, but we will give it a try', or something of that nature. And we would object to it on the following grounds: 'because it is nothing but evidence of good conduct, and, in effect, has nothing at all to do with the question of whether or not the particular witnesses, who were the government witnesses, were defrauded in any way. We could call a million people who were never defrauded by Jack King,

but that is not the issue. The ques- is whether or not the witnesses that the government called were defrauded." (TR.335).

Despite quite learned and lucid argument by defense counsel, the district judge sustained the government's objection and the petitioner's defense was left completely emasculated and ineffective.

2.- Of all the witnesses called by the government to testify as to what happened when they visited petitioner's office concerning the matter of getting their relatives out of Cuba only two, Jose Paneques Vandeneres and Angel Diego Milian ever had any conversations or meetings with the petitioner Jack L. King. And, as to Vandeneres, there was no testimony whatsoever to indicate any fraud in King's part. The testimony of Miliam at the trial was particularly damaging to petitioner, but in post trial deposition of this witness, it was brought out that he has withheld information concerning certain other relatives' departures from Cuba following his transactions with the petitioner, which had this made known to the jury would had tended to controvert his trial testimony. This deposition testimony was presented to the

district judge with a renew motion for a new trial, which was denied. It is highly improbable that the assistant United States Attorney prosecuting this case was not aware that Milian's other relatives had departed from Cuba after presenting the documents prepared by the petitioner for Milian to sent to those relatives in Cuba.

All the other Cuban refugees witnesses called by the government never saw any one in petitioner's office except the secretary or other "employees". Any representation made to them were made by the secretary or "employee", not in the presence of the petitioner, and, as far as the record of the trial shows, without any knowledge on petitioner's part. The secretary, who was a co-defendant below, did not take the stand, and thus there was never any evidence to show that she acted in any other manner except as she saw fit in speaking to and taking information from these witnesses.

The district judge, in his instructions to the jury, charged them as follows:

> "Each defendant is entitled to have his or her innocence of each of the crimes charged determined from his or her con-

duct and from the evidence which applies to him or her as if he or she were being tried alone."(TR. 449).

He then charged them further:

"That the guilt or innocence of the accused may be established without proof that the accused did every act constituting the offense charged." (TR. 446)..

REASONS FOR GRANTING THE WRIT

1.- The decision below is in direct conflict with the principles enunciated by the Court of Appeals for the Seventh Circuit,. in Worthington v. United States, 64 F.2d 936, and in United States v. Shavin, 287 F.2d. 647, 90 ALR 2d. 888.

In United States v. Shavin, a case with marked similarity to the case at bar, Shavin was an attorney charged with using the mails to defraud certain insurance companies by raising the amount due on copies of doctors' bills submitted by him to the insurance companies in connection with personal injuries claims he was handling. In that case, as in the instant case, Shavin proffered evidence, from witnesses ready to testify, that in other transactions of a similar nature handled by him, correct doctors' bills were submitted by him to in-

surance companies, this for the purpose of showing the defendant had no intention to defraud and that he acted in good faith. There, as in the instant case, the trial court sustained the government objection to this type of evidence.

The Court of Appeals, Seventh Circuit, in reversing and remanding the Shavin case cited Worthington v. United States(1933), 7th Cir. 64 F.2d. 936, and stated as follows:

> "In the instant case the defendant attempted to prove transactions where the medical bills were as represented. The crucial issue in the instant case was the existance of a scheme to defraud and lack of good faith. The government was properly permitted to introduce evidence of similar transactions to prove fraudulent intent, and conversely the defendant should be entitled to negate the fraudulent intent by the evidence which was offered*****." (Empahsis supplied).

In the case at bar, petitioner King believes, the factual evidence as to fraudulent intent, and the proffered evidence to negate such intent, is all fours in point to Worthington and Shavin. The trial court's refusing the testimony proffered by petitioner, and the Court of Appeals' affirmance of that judgment on appeal and petition for rehearing, brings this case directly in con-

flict with the long standing rulings of the Seventh Circuit on this question, and thus brings the question squarely before the Supreme Court to reconcile these conflicts and differences between the Seventh Circuit and the Fifth Circuit, in accordance with the outstanding policy of the Supreme Court.

Since the lack of bad faith and of intent to defraud was the only defense petitioner had on the trial of this cause the judgment of the Court of Appeals affirming the trial court ruling on this evidence, petitioner has been, or is about to be, deprived of his liberty or property, without due process of law, as guarantee to him by the Fifth Amendment to the Constitution of the United States.

2.- The Supreme Court of the United States has in Ingram v. United States, 360 U.S. 672, and in Kotteakos v. United States, 328 U.S. 750, 756; 66 S. CT. 1239, 1248; 90 L.Ed.1557, (1946), held that when some of a number of conspirators had personal knowledge of federal gambling taxes being due and not paid, in the absence of proof that two of the conspirators did have such

knowledge, the Supreme Court declined to attribute the actual knowledge of the other conspirators to those two defendants, and so reversed the conviction as to the two defendants. The Court of Appeals in Phillips v. United States, 356 F.2d. 296, followed the Ingram case in reversing the convictions of the defendants Phillips and Walker.

In Reisman v. United States 409 F.2d 789, the Court of Appeals for the Ninth Circuit, citing Kotteakos v. United States (supra), holds to the principle, that while orderly administration of justice requires adhearing to the rule that errors be ascertained in the trial court, exceptions must be recognized in unusual circunstances involving seriously prejudicial deficiencies in the trial process. The Court said, in reversing and remanding:

> "There was little dispute as to the facts at trial. Appellants principal defense was that they did not intent to deceive; and this issue was hotly contested. The trial judge expressed the view that the jury would have difficulties in resolving it.*****
>
> "As we have said, in diciding the critical issue of intent, the jury was erroneously permitted to assume that each of the appellants had knowledge of numerous letters complaining of

misrepresentations, because such letters were found in company files or were known to persons, other than defendants connected with the enterprise. The contents of these letters was extremely damaging.*****

"On this record, we 'cannot say, with fair assurance, **** that the judgment was not substantially in error****since it is impossible to conclude that substantial rights were not affected.' (Kotteakos v. United States 328 U.S. 750, 756;66 S.CT. 1239, 1248; 90 L. Ed. 1557, (1946), reversal is required."

In the case at bar, the government's evidence of intent to defraud consisted, in the main, of testimony from witnesses who did not see or talk to petitioner King, but only saw or spoke with a secretary or other "employee". There was not evidence on the trial that King had actual knowledge of any representation, either true or false, made by that secretary or "employee" to said witnesses. And, although error was not asserted at the trial, the failure of the trial judge to clarify his instructions to the jury on this point brings this case withing the exceptions recognized by this Court in the Ingram and Kotteakos cases, as followed by Reisman and Phillips in the court of appeals.

Again, the Fifth Circuit has departed from the principles enunciated in other circuits and in the Supreme Court itself, in affirming the conviction on appeal and in denying the petition for rehearing, in violation of petitioner's constitutional rights as guarantee by the Fifth Amendment to the Constitution of the United States.

## CONCLUSION

For the reasons above stated a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully Submitted

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Counsel for Petitioner.

## APPENDIX A

1.- On March 16th, 1971, the Court of Appeals entered a Per Curiam Decision, without opinion, affirming the conviction in the District Court.
(Copy of this decision not available).

2.- On May 10th, 1971 the Court of Appeals entered a Per Curiam Decision, denying the Petition for Rehearing as follows:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NO. 29719

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACK L. KING,

Defendant-Appellant.

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Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Mar. 16, 1971, 5 Cir., 1971, _____ f. 2d _____).

MAY 10, 1971

Before TUTTLE, AINSWORTH and SIMPSON
Circuit Judges

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

## APPENDIX B

VERDICT, JUDGMENT, AND SENTENCE IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHER DISTRICT OF FLORIDA.

VERDICT: (TR. pp,458-559).

"United States District Court, Southern District of Florida. Case No. 68-489-Criminal.

"United States of America v. Jack L. King. Verdict, January 23, 1970. Miami, Florida.

"We, the jury, find the defendant Jack L. King:

"Guilty as to Count I
"Guilty as to Count III
"Guilty as to Count IV
"Guilty as to Count V
"Guilty as to Count VI
"Guilty as to Count VIII
"Guilty as to Count VIIII
"Guilty as to Count X
"Guilty as to Count XI
"Guilty as to Count XII,
"Guilty as to Count XIII
"Guilty as to Count XIV, as charged in the indictment.

"So say we all.

"(Signed) Bert W. Hocker, Foreman."

APPENDIX B ( Cont.)

JUDGMENT:

"THE COURT:

All right, sir. Mr. Marshall, will you please set the defendant Jack L. King before the bar so that judgment may be pronounced in accordance with the verdict of the jury.

Jack L. King, upon the rendition of the verdict of the jury finding you guilty as to Count I, Count III, Count IV, Count V, CountVI, Count VIII, Count VIIII, Count X, Count XI, Count XII, Count XIII, and Count XIV, severally, as charged in the indictment, the Court now adjudges you guilty of the offenses charged in Count I Count III, Count IV, Count V, Count VI, Count VIII, Count VIIII, Count X, Count XI, Count XII, Count XIII, And CountXIV, severally, as charged in the indictment." (TR.463-464).

SENTENCE:

JUDGMENT AND COMMITMENT

(Number and Title Omitted) (Filed April 9, 1970).

On this 9th day of April, 1970 came

APPENDIX B (Cont.)

the attorney for the government and the defendant appeared in person and with counsel, Morton Orbach, Esq.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty and a Jury verdict of Guilty has been convicted of the offense of mail fraud, in violation of Title 18, United States Code Section 1341, as charged in Counts 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED, that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR and ONE (1) DAY, as to Count 1, or until otherwise discharged by due process of law, and pay a fine unto the United States of America

APPENDIX B: (Cont.)

in the sum of ONE THOUSAND ($1,000.00) DOLLARS, and ONE (1) YEAR AND ONE (1) DAY as to each of Counts 3, 4, 5, 6, 8, 9 10, 11, 12 and 13, said sentences of confinement to run concurrently with each other, and concurrently with sentence imposed as to Count 1, and it is further

ORDERED that imposition of sentence of confinement be withheld as to Count 14, and the defendant placed on probation with this Court for a period of THREE (3) YEARS under the Standing Conditions of Probation outlined in the Court's Order entered August 1, 1964, probation to commence immediately upon defendant's release from incarceration herein above imposed as to Count 1.

IT IS ORDERED That the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ W. O. MEHRTENS
UNITED STATES DISTRICT JUDGE.

CER TIFICATE OF SERVICE

I herby certify that on this 9th day of June 1971 two true and correct copies of the foregoing Petition For A Writ of Certiorari was mailed to the office of the Solicitor General of the United States, Supreme Court Building, Washington, D.C.

Gino P. Negretti